Laborers' International Union of North America, Local 860 *and* Ballast Construction, Inc.

Mr. Excavator *and* International Union of Operating Engineers, Local 18, AFL–CIO.

Laborers' International Union of North America, Local 310 *and* Mr. Excavator *and* International Union of Operating Engineers, Local 18, AFL–CIO. Cases 08–CD–103113, 08–CD–103657, and 08–CD–103660

September 23, 2016

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

This is a consolidated jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Employer Ballast Construction, Inc. (Ballast) filed an unfair labor practice charge in Case 08–CD–103113 on April 18, 2013.[1] Additional charges were filed on April 25 in Cases 08–CD–103657 and 08–CD–103660 by Employer Mr. Excavator. The Employers allege that Laborers' International Union of North America, Locals 860 and 310 (Laborers, or Local 860 and Local 310 individually) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing each Employer to assign certain work to employees represented by Laborers rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers or Local 18). A notice of hearing issued on June 28, and an Order consolidating cases and notice of rescheduled hearing issued on August 16. A hearing was held on September 4, 5, and 6 before Hearing Officer Gregory M. Gleine. Thereafter, Ballast, Mr. Excavator, Operating Engineers, and Laborers filed posthearing briefs.[2]

The Board affirms the hearing officer's rulings, finding them free from prejudicial error, as discussed below. On the entire record,[3] we make the following findings.

[1] All dates are in 2013 unless otherwise indicated.

[2] Laborers' posthearing brief incorporates the Employers' posthearing briefs and adopts the Employers' arguments as its own.

[3] The Board has issued several Sec. 10(k) determinations in cases raising essentially the same issues as here with respect to jurisdictional work disputes between Operating Engineers Local 18 and one or more Laborers locals over the operation of skid steers and similar equipment by employees of numerous employers on jobsites within Local 18's jurisdiction in the State of Ohio. In every case, the Board awarded the disputed work to employees represented by Laborers. See *Laborers Local 894 (Donley's, Inc.)*, 360 NLRB No. 20 (2014) *(Donley's I)*; *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB No. 40 (2014); *Laborers Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB No. 102 (2014); *Operating Engineers Local 18 (Donley's, Inc.)*, 360 NLRB No. 113 (2014) *(Donley's II)*; *Laborers Local 310 (KMU Trucking & Excavating)*, 361 NLRB No. 37 (2014) *(Donley's III)*; and *Operating Engineers Local 18 (Nerone & Sons)*, 363 NLRB No. 19 (2015). We take official notice of these decisions.

[4] This contract, like all other collective-bargaining agreements referred to below, was current at the time of the events in this case.

[5] A skid steer is a small four-wheeled utility machine with various attachments, including augers, cutter heads, rotary brooms, jack hammers, and buckets. *Ronyak Paving, Inc.*, supra, 360 NLRB No. 40, slip op. at 1 fn. 2.

I. JURISDICTION

The parties stipulated that in the 12-month period prior to the filing of the charges in the present case, Employers Ballast and Mr. Excavator each purchased and received materials valued in excess of $50,000 directly from points located outside the State of Ohio. We find that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties also stipulated, and we find, that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

1. Ballast

Ballast is engaged in commercial fence installation, primarily in northeastern Ohio. It has eight employees working in the field, each of whom is a member of Laborers. Ballast has a long-term collective-bargaining relationship with Laborers Local 860 and is signatory to the Local's collective-bargaining agreement with the Ohio Contractors Association (OCA).[4] In 2011, under a subcontract with general contractor McNally-Kiewit ECT JV (McNally-Kiewit), Ballast began installing chain-link fences, gates, and barrier walls at the Euclid Creek Tunnel Project, an underground storm sewer project in the Cleveland area. According to Sean Kelly, a Ballast employee and member of Laborers Local 860, a business agent for Operating Engineers approached him at the Euclid Creek site in July 2011. Kelly was operating a "skid steer" to dig fence-post holes at the time.[5] The business agent told Kelly that the operation of skid steers was Operating Engineers' work. Soon thereafter, Steve DeLong, a business agent for Operating Engineers, informed Ann Nerone, Ballast's president, that she had no right to assign skid-steer work to Laborers and that she was taking jobs away from Operating Engineers members. DeLong also said that if she continued to assign this work to Laborers employees, Operating Engineers would

"make a problem" for Ballast at its Interstate 670/Interstate 71 interchange project, an upcoming project in Columbus, Ohio, that Ballast had successfully bid with a different general contractor.

Nerone testified that, in the fall of 2011, Operating Engineers filed a contractual grievance against McNally-Kiewit concerning Ballast's use of a laborer on the skid-steer assignment at Euclid Creek. McNally-Kiewit is signatory to the Operating Engineers' collective-bargaining agreement with OCA covering sewer and utility construction. That agreement contains a work-preservation clause with a relevant damages provision and a provision concerning subcontracting.

Employee Kelly testified that he was approached by another Operating Engineers business agent in January 2012 while he was operating a skid steer at the Interstate 670/Interstate 71 site. The business agent told Kelly that Operating Engineers would picket or otherwise shut down the project if the work were not reassigned to its members. Operating Engineers subsequently filed a work-preservation/subcontracting grievance with the general contractor of the project. Kelly testified that, in January 2013, while he was again working at the Euclid Creek site, an Operating Engineers business agent took photographs of him operating the skid steer. On January 29, Operating Engineers filed another work-preservation/subcontracting grievance with McNally-Kiewit concerning Ballast's skid-steer assignment to Laborers employees at Euclid Creek.

In light of Operating Engineers' conduct over the preceding months, Ballast notified Laborers Local 860 on April 16 that it would reassign its skid-steer work at the Euclid Creek site to Operating Engineers. Anthony Liberatore, business manager of Laborers Local 860, responded on April 17, claiming the skid-steer work and stating that Laborers would strike and/or picket the project if the reassignment were made. Ballast then filed the unfair labor practice charge against Laborers in Case 08–CD–103113.

2. Mr. Excavator

Mr. Excavator is a construction contractor operating in the State of Ohio. Mr. Excavator employs both Laborers and Operating Engineers members as its employees. Through its membership in both OCA and the Construction Employers Association (CEA), it is signatory to collective-bargaining agreements with Laborers Locals 860 and 310 and with Operating Engineers.

Timothy Flesher, the executive vice-president of Mr. Excavator, testified that in July 2012 he received a copy of a letter signed by Patrick Sink, a business manager for Operating Engineers. The letter stated that, in light of recent contract developments between CEA and Laborers concerning the assignment of skid-steer work, Operating Engineers would file "pay-in-lieu" grievances for breach of contract and wage and benefit damages against any employers signatory to CEA's contract with Operating Engineers who assigned this work to Laborers. Flesher also testified that later in July 2012, during a pre-job conference concerning Mr. Excavator's MetroHealth Medical Center project in Middleburg Heights, Ohio, David Russell, a business representative for Operating Engineers, told him that Operating Engineers would be claiming all skid-steer work on the project and would file grievances to enforce its asserted contractual right to the work.

On October 22, 2012, Operating Engineers filed a pay-in-lieu grievance against Mr. Excavator alleging a contract breach due to the operation of skid steers by Laborers employees at Mr. Excavator's Baldwin Road site in Kirtland Hills, Ohio. On October 31, 2012, Operating Engineers filed another pay-in-lieu grievance against Mr. Excavator claiming that a Laborers employee had been operating a skid steer at the MetroHealth site.

Given the conduct of Operating Engineers over the preceding months concerning the skid-steer work, on April 17 Flesher sent letters to both Laborers Local 310 and Local 860, explaining that it would begin assigning the work to Operating Engineers employees. Terence Joyce, Business Manager of Local 310, by letter dated April 18, and Liberatore of Local 860, by letter dated April 19, each responded that his Local would picket and/or strike to retain the work, if necessary. Consequently, Mr. Excavator filed the unfair labor practice charges against the Laborers Locals in Cases 08–CD–103657 and 08–CD–103660.

On August 8, Operating Engineers filed another pay-in-lieu grievance against Mr. Excavator, which alleged that skid-steer work was assigned to a Laborers employee at the Employer's Cleveland Hopkins International Airport project in Cleveland.

B. Work in Dispute

We find that the work in dispute is the operation of skid steers, with all related attachments, at Ballast's work site at the Euclid Creek Tunnel Project, Cleveland, Ohio; and at Mr. Excavator's work sites at MetroHealth Medical Center, Middleburg Heights, Ohio; Cleveland Hopkins International Airport, Cleveland, Ohio; and the Baldwin Road Project, Kirtland Hills, Ohio.

C. Contentions of the Parties

The Employers and Laborers contend that there are competing claims for the work in dispute and that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated in light of the Laborers' threats to

strike and/or picket concerning the assignment of skid-steer work at the construction projects referenced above. They further contend that the work in dispute should be awarded to the Employers' employees represented by Laborers based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. Finally, they contend that a broad areawide award is warranted because it is likely that disputes over the assignment of skid-steer work will arise on the Employers' future projects. They request that the award extend to the geographic area where the Employers perform work and where the jurisdictions of Laborers Locals 310 and 860 and Operating Engineers coincide.

Operating Engineers, renewing before us a motion denied by the hearing officer, contends that the August 16 Notice of Rescheduled Hearing should be quashed, citing several grounds. First, it contends that its due process rights have been violated because the Notice did not identify the work sites where the skid-steer work is allegedly in dispute. Then, with regard to Ballast, it contends that it has not made a competing claim for the skid-steer work. Relying on *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), it argues that it has pursued only a contractual grievance against McNally-Kiewit, the general contractor at the Euclid Creek site, for failing to honor the subcontracting clause in the OCA agreement. With respect to Mr. Excavator, Operating Engineers argues that its disagreements are a matter of contractual work preservation, not a claim for disputed work cognizable under Section 10(k). Finally, with regard to both Employers, Operating Engineers argues that the notice of hearing should be quashed because Laborers' threats to strike or picket were a sham, resulting from collusion with each Employer to fabricate a jurisdictional dispute.

Should the notice of hearing not be quashed, Operating Engineers asserts that the skid-steer work should be awarded to employees it represents based on the factors of collective-bargaining agreements, area and industry practice, employer preference, economy and efficiency of operations, and relative skills and training. Finally, it contends that the scope of the award of the disputed work, if any is made, must be limited to the specific job sites at issue in this proceeding.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. Id. On this record, we find that this standard has been met.[6]

1. Competing claims for work

We find reasonable cause to believe that all three Unions have claimed the work in dispute for the employees they represent. Laborers has claimed the work by its letters from business managers for Locals 860 and 310 to each of the Employers, objecting to any assignment of the skid-steer work to Operating Engineers–represented employees. Moreover, the Laborers' "performance of the work indicates that they claim the work in dispute." *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74, 76 (1973); see also, e.g., *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) (same) (citing *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998 fn. 6 (2003) (same)).

We also find that Operating Engineers has claimed the disputed work. With regard to Case 08–CD–103113, we find no merit in Operating Engineers' contention that it merely filed a subcontracting grievance against McNally-Kiewit, the general contractor, and thus made no claim for the disputed work against Ballast. In *Capitol Drilling*,

[6] The August 16 notice of rescheduled hearing stated that "all of the Employers' current job sites" would be at issue in the hearing. Operating Engineers moved to quash the notice partly on due process grounds, citing the failure of the notice to specifically identify which of the Employers' work sites are involved in this work dispute. The hearing officer denied the motion, while also specifying that Ballast's Euclid Creek site and three of Mr. Excavator's sites are involved: MetroHealth Medical Center, Cleveland Hopkins International Airport, and Baldwin Road.

Operating Engineers has renewed its due process claim before us. We note that the Board addressed and rejected similar arguments by Operating Engineers in *Donley's II*, supra, 360 NLRB No. 113, slip op. at 1 fn. 5, and in *Nerone & Sons*, supra, 363 NLRB No. 19, slip op. at 1 fn. 3. We also note that only two of Ballast's sites could possibly have been involved in this case: Euclid Creek and Interstate 670/Interstate 71. As for Mr. Excavator, prior to the hearing, Operating Engineers had filed pay-in-lieu grievances, unresolved at the time of the hearing, regarding the three sites the hearing officer specified. In light of the above, we find it dubious, at best, that Operating Engineers did not reasonably anticipate which work sites would be at issue in the hearing. In any event, we observe that Operating Engineers, like the other parties, had a full opportunity at the hearing to adduce evidence and fully litigated the work disputed at the sites the hearing officer specified. Significantly, it has made no affirmative showing that its case was prejudiced due to any lack of specificity in the notice of hearing. Accordingly, the hearing officer's ruling is affirmed. See generally, e.g., *Operating Engineers, Local 2 (PVO International)*, 209 NLRB 673, 673 fn. 2 (1974); *Longshoremen, Local 10 (Matson Navigation)*, 140 NLRB 449, 451 fn. 2 (1963).

supra, 318 NLRB at 811–812, relied on by Operating Engineers, the Board held that in the construction industry, a union's effort to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or court action does not constitute a claim to the subcontractor for the work. The Board, however, distinguished those cases in which a union does more than peacefully pursue a contractual grievance against a general contractor. The Board found that a true jurisdictional dispute arises when a union seeking enforcement of a contractual claim not only pursues its contractual remedies against the employer with which it has an agreement, but also makes a claim for the work directly to the subcontractor that has assigned the work.

Here, unlike in *Capitol Drilling*, there is reasonable cause to believe that Operating Engineers made claims for the skid-steer work at Euclid Creek directly with Ballast. In July 2011, Operating Engineers business agent DeLong told Ballast's president that she was taking jobs at the site away from Operating Engineers members and that there would be "a problem" in the future at the Interstate 670/Interstate 71 site if she continued this assignment to Laborers employees. In January 2012, another business agent for Operating Engineers directly threatened coercive action because of Ballast's assignment of skid-steer work to its Laborers employees at the Interstate 670/Interstate 71 site. In January 2013, an Operating Engineers business agent took photographs of Ballast employee Kelly operating a skid steer at the Euclid Creek site.

In Cases 08–CD–103657 and 08–CD–103660, Operating Engineers threatened to file and filed pay-in-lieu grievances directly against Mr. Excavator regarding all three work sites identified at the hearing; each grievance alleged contract violations with respect to the assignment of the work in dispute to employees represented by Laborers. "The Board has long held that pay-in-lieu grievances alleging contractual breaches in the assignment of work constitute demands for the disputed work." *Donley's II*, supra, 360 NLRB No. 113, slip op. at 4; see also, e.g., *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 202 (2005).

We find no merit in Operating Engineers' contention that its grievances represent work preservation claims rather than claims for new work. The record shows that Laborers-represented employees were routinely performing the skid-steer work at all of Mr. Excavator's construction projects at issue and that Mr. Excavator has consistently assigned the work in dispute to its employees represented by Laborers. Where a labor organization is claiming work that has not previously been performed by employees it represents, the "objective is not work preservation, but work acquisition," and the Board will resolve the dispute through a 10(k) proceeding. *Donley's III*, supra, 361 NLRB No. 37, slip op. at 3; *Electrical Workers, Local 48 (Kinder Morgan Terminals)*, 357 NLRB 2217, 2219 (2011), and cases cited there.

2. Use of Proscribed Means

We find reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As set forth above, Local 860 Business Manager Liberatore and Local 310 Business Manager Terry Joyce sent letters to the Employers stating that members of Laborers would strike and/or picket at the work sites involved in this proceeding if the skid-steer work was assigned to employees other than those represented by Laborers. These statements constitute threats concerning the assignment of the skid-steer work, and the Board has long considered such threats to be a proscribed means of enforcing claims to disputed work. See, e.g., *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006).

We find no merit in Operating Engineers' assertion that each of the Employers has colluded with Laborers to create a sham jurisdictional dispute. The Board has consistently rejected this argument absent "affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion." *Operating Engineers Local 150 (R&D Thiel)*, supra, 345 NLRB at 1140. There is no evidence on this record that Laborers' written threats to strike or picket over the assignment of the disputed work were the result of collusion with these Employers or were otherwise not genuine.

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

Based on the foregoing, we find that there are competing claims for the work in dispute,[7] there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and there is no agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find that the

[7] Mr. Excavator has renewed its objection to the hearing officer's rejection of evidence concerning a March 2013 audit of its payroll records by Operating Engineers Fringe Benefit Fund. The hearing officer ruled on the ground that the Fund is not a party to this proceeding. Mr. Excavator contends that this audit focused exclusively on the performance of skid-steer work and thus represents additional evidence of Operating Engineers' competing claim to the disputed work. If admitted, we would find it unnecessary to address this evidence because there is a sufficient showing on the record without it of Operating Engineers' competing claim. The hearing officer's ruling is affirmed on this basis.

dispute is properly before the Board for determination, and we affirm the hearing officer's denial of Operating Engineers' motion to quash the notice of rescheduled hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board has held that its determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

The parties stipulated that the work in dispute is not covered by any Board orders or certifications.

Regarding collective-bargaining agreements, Mr. Excavator and Ballast are parties to OCA's agreement with Laborers Local 860, which states that employees in job classifications operating skid steers are covered by the contract's wage and benefit scale. Mr. Excavator is also party to the CEA's agreement with Laborers Local 310, which identifies skid steers as equipment within that Local's work jurisdiction. In addition, Mr. Excavator is signatory to the CEA and OCA collective-bargaining agreements with Operating Engineers. The CEA contract identifies skid steers as equipment within Operating Engineers' work jurisdiction. The OCA contract specifies that skid-steer operators are covered by its wage and benefit scale.

We find that the language in each of these contracts covers the work in dispute. Accordingly, the factors of certifications and collective-bargaining agreements do not favor an award to either group of employees.

2. Employer preference and past practice

Representatives of both Employers testified that they prefer assigning the disputed skid-steer work to employees represented by Laborers. In addition, they testified that assignment of this work to their Laborers-represented employees is consistent with their past practice.

There is evidence of an isolated instance when Mr. Excavator used an employee represented by Operating Engineers to operate a rented skid steer for 3 days in September 2012. Such evidence does not demonstrate the existence of a practice of using Operating Engineers-represented employees for skid-steer work nor does it show that Mr. Excavator's past practice of using Laborers-represented employees is inconclusive. See, e.g., *Laborers Local 210 (Surianello General Concrete Contractor)*, 351 NLRB 210, 212 (2007), and cases cited there.

We find that the factor of employer preference and past practice favors an award of the work in dispute to employees represented by Laborers.

3. Area and industry practice

The Employers and Laborers argue that area and industry practice supports an award of the disputed work to Laborers-represented employees. Both Flesher and Nerone testified that area competitors of their companies use Laborers-represented employees for skid-steer work. Liberatore and Joyce testified that in their 35 to 40 years of experience in the jurisdictions of Local 860 and Local 310, respectively, the practice among contractors has been to use Laborers for skid-steer work.

Moreover, we take official notice that the Board has recently found that the area and industry practice in the geographic area relevant in the present case is to assign skid-steer work to Laborers-represented employees.[8]

We find that this factor favors an award of the work in dispute to employees represented by Laborers.

4. Relative skills and training

The record shows that Laborers and Operating Engineers both provide training in the operation of skid steers and that the employees they represent are adequately skilled in the use of this equipment. We find that this factor does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Both Employers submitted evidence that it is more efficient and economical for them to assign the operation of skid steers to employees represented by Laborers. Flesher and Nerone each testified that the utilization of skid steers is sporadic and is usually intermittent throughout the work day.[9] They stated that their Laborers-represented employees perform various other tasks apart from the work in dispute and that these are duties that Operating Engineers-represented employees do not

[8] See, e.g., *Donley's III*, supra, 361 NLRB No. 37, slip op. at 5; *Donley's II*, supra, 360 NLRB No. 113, slip op. at 6–7; *Donley's I*, supra, 360 NLRB No. 20, slip op. at 6. In those cases, as in the present proceeding, Operating Engineers relied primarily on "letters of assignment" and "work referrals" to demonstrate area and industry practice. The Board has rejected such evidence as inconclusive because they do not describe the actual work involved or the facts and circumstances surrounding the work. See *Donley's I*, supra, 360 NLRB No. 20, slip op. at 6.

[9] Flesher testified that Mr. Excavator's Laborers employees operate skid steers for 2 to 3 hours per day. Nerone testified that Ballast's Laborers employees operate skid steers for about 20 percent of the day.

perform. They also testified that, because the operation of skid steers is so limited during the work day, Operating Engineers-represented employees, although paid for the day, would be idle for those periods of time when the equipment is not in use.

We find that the factor of economy and efficiency of operations favors an award of the disputed work to the Employers' Laborers-represented employees.[10]

Conclusion

After considering all of the relevant factors, we conclude that the Employers' employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or its members.

Scope of Award

The Employers and Laborers request a broad areawide award of the skid-steer work covering the geographic area where the Employers perform work and where the jurisdictions of Operating Engineers and Laborers Locals 310 and 860 coincide. They contend that this award is justifiable because the skid-steer disputes in this proceeding are likely to recur and because Operating Engineers has shown a proclivity to violate Section 8(b)(4)(D).

In evaluating the appropriateness of a broad award in a 10(k) proceeding, the Board requires evidence that (1) the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) there is a proclivity by the offending union to engage in further proscribed conduct to obtain the disputed work.[11] We find that both of these requirements are satisfied here and that a broad award is warranted.

There is evidence in this case establishing that the work in dispute has been and will likely continue to be a source of controversy. The Employers intend to continue assigning the skid-steer work to employees represented by Laborers, and Operating Engineers has stated its intent to demand that the work be assigned to employees it represents. Thus, in addition to the disputes at Mr. Excavator's three work sites above, Operating Engineers made clear, through Patrick Sink's letter in July 2012, that it would file pay-in-lieu grievances against any employer signatory to its CEA collective-bargaining agreement who assigned skid-steer work to Laborers-represented employees. With regard to Ballast, Operating Engineers business agent DeLong threatened in July 2011 to make trouble at the Employer's Interstate 670/Interstate 71 work site because of the skid-steer assignment to Laborers employees at the Euclid Creek site. Operating Engineers made good on this threat in January 2012, claiming skid-steer work at the Interstate 670/Interstate 71 site and supporting the claim with a threat to picket.

More broadly, as we have noted, between May 2012 and November 2014, Operating Engineers has repeatedly engaged in jurisdictional disputes with Laborers locals, including Locals 310 and 860, over the assignment by various employers of work including the operation of skid steers at numerous jobsites within Local 18's jurisdiction in the State of Ohio, giving rise to several other cases under Section 10(k) of the Act. In each case, the Board awarded the work in dispute to employees represented by Laborers.[12] Given the evidence in the present record and the recent relevant events in the area, we conclude that the work in dispute has been a continuous source of controversy and that similar disputes are likely to recur on other jobsites within Operating Engineers' jurisdiction.

We also find that the "proclivity" standard for a broad award is satisfied, given the relevant circumstances. In *Donley's I*, *Donley's II*, and *Nerone & Sons*, Operating Engineers was the party charged with proscribed conduct, and the Board found reasonable cause to believe that it had engaged in conduct violative of Section 8(b)(4)(D). Further, in *Operating Engineers Local 18*, 363 NLRB No. 184 (2016), the Board found that this same union violated Section 8(b)(4)(D) of the Act by filing and maintaining pay-in-lieu grievances with an object of forcing the employers in that case to assign the operation of disputed skid-steer and forklift work to employees it represented, contrary to the Board's prior award of this work to Laborers-represented employees.[13]

[10] Operating Engineers argues that the Employers' assignment of the work in dispute to employees represented by Laborers is not economical, taking into account the Operating Engineers' ongoing efforts to secure damages resulting from the Employers' alleged breaches of the OCA and CEA agreements. We reject this argument because it is premised on the assumption that those efforts would be lawful. In fact, pursuing a pay-in-lieu grievance after the Board awards work that is in dispute violates Sec. 8(b)(4)(ii)(D). See *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274 (1992), enfd. 46 F.3d 1143 (9th Cir. 1995).

[11] See, e.g., *Donley's II*, supra, slip op. at 7 and cases cited at fn. 13.

[12] See the cases cited in fn. 3 above.

[13] Here, where the events giving rise to the work dispute predate the controversy in *Donley's II* where Chairman Pearce dissented from the areawide award, he similarly would not award it here. 360 NLRB No. 113, slip op. at 8 fn. 15. He agrees, however, that the areawide award, as restated in subsequent cases, remains in effect.

In *Donley's II*, supra, 360 NLRB No. 113, slip op. at 7, the Board granted an areawide award encompassing the work in dispute here. Thereafter, in *Donley's III,* supra*,* 361 NLRB No. 37, slip op. at 6*,* and *Nerone & Sons*, supra, 363 NLRB No. 19, slip op. at 6, the Board restated and applied this areawide award. Although a request for an areawide award is not often granted when the charged party represents the employees to whom the work is awarded,[14] the Board's consideration of a request for such an award is not limited to a consideration of the conduct of the charged party.[15] Rather, the critical factor is whether "there is evidence that similar disputes may occur in the future."[16] Accordingly, the Board in *Donley's III* found that restatement and application of its prior areawide award was appropriate even though a Laborers local was the charged party. Similarly, the evidence recounted in this case, together with that considered in the prior *Donley's* cases and *Nerone & Sons*, clearly establishes a likelihood of such recurrence. Additionally, the prior grant of an areawide award cannot be ignored. Thus, in these circumstances, and even giving due consideration to the fact that Operating Engineers is not the charged party in this proceeding, we find that it is entirely appropriate to again reaffirm and apply our earlier grant of the areawide award.[17]

[14] See, e.g., *Ronyak Paving*, supra, 360 NLRB No. 40, slip op. at 7.

[15] See, e.g., *Bay Counties Carpenters (Northern California Contractors Assn.)*, 265 NLRB 646, 650 fn. 9 (1982) (finding conduct of noncharged party relevant to grant of areawide award).

[16] *Carpenters (Standard Drywall)*, 348 NLRB 1250, 1256 (2006), enfd. sub nom. *Standard Drywall, Inc. v. NLRB*, 547 Fed. Appx. 809 (9th Cir. 2013). See also *Laborers Local 1184 (Massey Sand and Rock Co.)*, 198 NLRB 77, 79 (1972).

[17] The only Laborers local involved as a party and named in the broad award in *Donley's II* and *III* and in *Nerone & Sons* was Local 310. In this case, as in *Ronyak Paving*, Laborers Local 860 is the only party involved in the dispute with Operating Engineers Local 18 over work performed by Ballast employees, although the dispute over work performed by Mr. Excavator's employees involves both Local 860 and 310. It appears that the distinction between the two Laborers locals turns on whether contracting employers operating within the same northeast Ohio geographic area perform heavy highway and utility work (Local 860) or other general construction work (Local 310). Accordingly, we find it appropriate to amend our prior areawide award to include performance of the disputed work by Local 860-represented employees within the area covered by that award.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Ballast Construction, Inc. and Mr. Excavator who are represented by Laborers' International Union of North America, Locals 310 and/or 860, are entitled to perform skid-steer work in the area where their employers operate and the coincident jurisdictions of Laborers' International Union of North America, Locals 310 and 860, and the International Union of Operating Engineers, Local 18, overlap.

Dated, Washington, D.C. September 23, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD